REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.34 OF 2015

JULIUS MOGAKA GEKONDE t/a E-SMART TECHNICAL COLLEGE
.....APPLICANT/PLAINTIFF

VERSUS

OURU POWER LIMITED.....1ST
DEFENDANT/RESPONDENT

JOSEPH O. NYACHOTI t/a MINMAX AUCTIONEERS.....2ND
DEFENDANT/RESPONDENT

RULING

Background

This ruling relates to the following 4 Notice of Motion applications:

- Application dated 27th October 2015 (*hereinafter referred to as the 1st application*).
- Application dated 2nd November 2015 (*hereinafter referred to as the 2nd application*).
- Application dated 4th November 2015 (*hereinafter referred to as the 3rd application*).
- Application dated 5th November 2015 (*hereinafter referred to as the 4th application*).

1. By a lease agreement dated 1st December 2012, the Plaintiff herein **Julius Mogaka Gekonde t/a E-Smart Technical College** entered into a tenancy agreement with the 1st Defendant in which the 1st Defendant agreed to lease part of his premises in the building known as Ouru Power Centre situate within Kisii Town to the plaintiff for a period of 61 months (**5 years and 1 month)** commencing on the 1st day of December 2012 and terminating on the 31st of December 2017 at an greed monthly rent of Kshs.892,688/=.

2. The said lease agreement stipulated that the rents shall be paid quarterly in advance. It has been alleged that notwithstanding the clear terms of the lease agreement the Plaintiff failed to pay agreed rent in the manner agreed upon and this prompted the 1st defendant to issue the plaintiff with a rent payment schedule dated 12th May 2015 showing that the plaintiff was in arrears to the tune of Kshs.3,586,901/=. It is further alleged that despite being issued with rent schedule

statement, the plaintiff failed to clear the accumulated rent arrears thereby prompting the 1st defendant to serve the plaintiff with a notice to pay/clear rent arrears in a letter dated 1st October 2015. The plaintiff allegedly still failed to clear the rent arrears and as a result, the 1st defendant retained the services of the 2nd defendant to levy distress against the movable properties of the plaintiff.

3. The plaintiff then commenced the instant suit through a plaint dated 27th October 2015 in which he sought various orders including payment of damages for illegal distress and taking of accounts pertaining to the rents so far paid and received by the 1st defendant.

1st application

4. Simultaneously with the filing of the plaint, the plaintiff also filed a Notice of Motion application dated 27th October 2015, under Order 40 rule 1 and 2 of the Civil Procedure Rules seeking orders as follows:

1. **Spent.**
2. **Spent.**
3. **That pending hearing and determination of this suit there be an order of temporary injunction issued against the respondents by themselves, their servants, agents or any person acting under their instructions restraining them from trespassing, entering into the demised premises and taking away the proclaimed properties of the applicant evicting or in any other manner interfering with the applicant's tenancy.**
4. **That costs of this application be provided for.**

5. The application is supported by the affidavit of Julius Mogaka Gekonde the plaintiff herein in which he acknowledges being the 1st defendant's tenant vide a lease agreement dated 1st December 2012 and that he runs a college that has over 600 students in the 1st defendant's said premises.

He further depones that on 19th September 2015 a dispute arose over the amount of arrears of rent due and owing from him to the 1st defendant when he paid the sum of Kshs.900,000/= and that the 1st defendant, without any notice or tendering of proper accounts, instructed the 2nd defendant to levy distress on the goods and chattels of the college.

6. He further contends that on the 19th October 2015, the 2nd defendant levied distress on his goods at the college and also threatened to enter the premises, seize and move away the proclaimed goods and chattels thus disposses him from the premises. He further states that the goods and chattels that were proclaimed are tools of trade that are used by the college to run the affairs of the students and that the college, which is also an approved examination centre, and was likely to suffer irreparable loss should the respondents seize the proclaimed goods and chattels.

7. He avers that the college has over 600 students who were preparing for examinations that were due to commence in November/December 2015 and therefore the student's careers were at stake since the goods and chattels proclaimed included motor vehicles, desks and photocopy machines that the students required for their examinations and daily academic purposes. The plaintiff also avers that the 2nd defendant had not shown any letter of instructions or certificate of the Auctioneers Board authorizing him to levy distress.

8. In response to the Plaint and application, defendants filed a Memorandum of Appearance dated 30th October 2015 through the firm of M/S Kimanga & Company Advocates. Simultaneously with the Memorandum of Appearance, they also filed grounds of opposition citing the following grounds:

1. "The instant notice of motion application to pre-mature, misconceived, incompetent and otherwise legally untenable.

2. The plaintiff is admittedly in rent arrears and hence the application herein is meant to vindicate and/or protect a chronic and persistent defaulter in rent payments. Consequently, the instant application and the suit has been made in bad faith and hence reeks of *mala-fides*.

3. The instant application does not lie and in any event the orders sought in terms of application are barred by the provisions of ***Section 8 of the distress of Rent Act, Chapter 293, Laws of Kenya.***

4. In any event, the plaintiff/applicant has neither shown nor exhibited any prima facie case with overwhelming chances of success. Consequently, the plaintiff has not satisfied the requisite conditions to warrant granting the orders of temporary injunction, whatsoever.

5. Besides the plaintiff has not shown or established any irreparable loss or at all that the same is bound to accrue or suffer if the orders sought are not granted.

6. The plaintiff/applicant's suit together with the notice of motion application filed and/or mounted by the plaintiff, do not disclose and/or capture any reasonable cause of action.
7. The instant application constitutes or amounts to an abuse of the due process of court.

8. The plaintiff is ***Non-suited***.

9. The Notice of Motion application herein is devoid of merits, whatsoever and/or howsoever."

9. On 28th October 2015, the 1st application was certified as urgent and was then fixed for inter partes hearing on 30th October 2015.

On 30th October 2015, this court granted orders of interim injunction restraining the defendants from entering the leased premises and taking away the proclaimed goods of the applicant, evicting the applicant or in any manner interfering with the tenancy pending interpartes hearing of the application on 11th December 2015.

10. It is these interim orders issued on 30th October 2015 that precipitated the 2nd and 4th applications.

2nd application

11. Before the 1st application could be heard and determined, the defendants filed a Notice of Motion application dated 2nd November 2015 under **Order 40 Rule 4(2), 3 & 4 & 7 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act and Articles 47, 48, 159 (2) (b),** and (**d)** of the **Constitution 2010** seeking the following orders:-

1. Spent.
2. Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an order of stay staying the implementation and/or enforcement of the interim orders of injunction granted by this Honourable Court on the 30th day of October 2015, restraining the defendants from levying distress against the plaintiff with a view to recovering the outstanding rent arrears currently standing in the sum of Kshs.6,801,151/= only.
3. Pending the hearing and determination of the instant application, the Honourable court be pleased to grant an order of stay, staying further proceedings over and in respect of the instant matter and more particularly, the hearing of the plaintiff's application dated 27th October 2015 or any other applications on behalf of the plaintiff.
4. The Honourable Court be pleased to discharge, vary, vacate and/or set aside the interim orders of

injunction issued herein on the 30th day of October 2015, restraining the defendants from levying distress against the plaintiff with a view to recovering the outstanding rent arrears currently standing in the sum of Kshs.6,801,151/= only which is lawfully due and owing.

5. The Honourable Court be pleased to strike out the plaintiff's plaint together with the Notice of Motion application dated 27th October 2015.
6. Costs of this application and main suit be borne by the plaintiff.
7. Such further/or other orders be made as the court may deem fit and expedient.

12. The above application is supported by the affidavit of Zablon Mogambi Mogaka the managing director of the 1st defendant in which he acknowledges the existence of a lease agreement between the 1st defendant and the plaintiff over the premises situated on **LR.No.Kisii Municipality/Block III/3, 4, 5 & 6** otherwise also known as Ouru Power Centre and that pursuant to the said lease agreement, the plaintiff was obliged to pay the rents due, quarterly in advance.

13. He further depones that the monthly rent was agreed on for the period between 1st day of December 2014 to 30th November 2015 at Kshs.892,688/= only with the first quarter of rent being due in January 2015, the 2nd quarter in April 2015, the third quarter in July 2015 and the final quarter in October 2015. He further contends that the plaintiff, despite being aware of the terms of the lease, failed to pay the quarterly rents in the manner agreed or at all. He states that instead, the plaintiff started paying rents on a piece-meal basis by sometimes paying amounts which fell way below the requisite monthly rents and therefore, owing to the default on the part of the plaintiff rent arrears continued to accrue and stood at Kshs.6,801,151/= as at October 2015.

14. The defendant contends that as a result of the accrued and accumulated rent arrears, the 1st defendant on 1st October 2015 issued a notice demanding the payment of rents together with an updated schedule showing the outstanding rents to the plaintiff. The defendant's deponent adds that despite being served with the notice, the plaintiff still failed and/or neglected to heed the demand and consequently, the 1st defendant was constrained to instruct the 2nd defendant to levy distress. He further contends that upon receipt of the letter of instructions, the 2nd defendant, who is a duly licensed class B Auctioneer, proceeded and issued a proclamation notice upon the plaintiff on 9th day of October 2015. He further contends that although the proclamation notice was issued and served on the 9th day of October 2015, the plaintiff herein misled the Honourable Court that same was issued and served in the 19th day of October 2015.

15. The 1st defendant's deponent further contends that the plaintiff is in arrears of substantial amounts of rent and is intent on abdicating his contractual obligations by obtaining and enjoying equitable orders of this court. He also states that whenever distress for rent is carried out, the tenant is obliged to make tender and pay the rent arrears due and owing in terms of the schedule which had been availed to him.

16. The 1st defendant further contends that given that the plaintiff is fully aware of the rent arrears due he is not entitled to the interim orders of injunction as the same are calculated to help the plaintiff escape his contractual obligations. In addition to this, the defendant contends that the interim orders of injunction cannot issue or be granted without an undertaking from the plaintiff as to damages that may arise and ensue pursuant to the grant of such an order.

The 1st defendant contends that this Honourable Court's action of granting the interim orders of injunction without requisite undertaking conferred collateral advantage upon the plaintiff who is not keen in paying the rent arrears and accruals. He thus contends that interim orders of injunction herein are bound to deny the 1st defendant the Economic benefits attendant to its ownership of the suit premises.

17. Lastly, he contends that the granting of the order of injunction sought to be impugned, was based on error, misrepresentation, concealment of facts and was calculated to afford the plaintiff undue

mileage over the 1st defendant. That in view of the foregoing it is appropriate that the interim orders of injunction granted on the 30th October 2015 be discharged so as to restore the sanctity of privity of contract.

3rd application

18. On 3rd November 2015, the 2nd application herein was certified as urgent and the parties directed to fix a suitable hearing date in the registry, but before the ink could dry on the order certifying the 2nd application urgent, Mr. Ombachi counsel for the plaintiff filed a 3rd application dated 4th November 2015. seeking the following prayers:-

1. "That this application be certified urgent.
2. That pending inter-partes hearing of this application the Honourable Court do issue an order of stay of sale of the attached motor vehicle registration number KBY 187A Isuzu Bus against the Respondents.
3. That an order do issue that the motor vehicle registration number KBY 187A Isuzu Bus attached by the Respondents on 29th October 2015 be released unconditionally to the applicant upon inspection being carried on the same by the inspector of motor vehicles, Kisii and his assessment report indicating no material damage to systems whose charges, if any, shall be borne by the respondents.
4. That alternatively, if the motor vehicle inspector's report reveals material damage to the systems of the said motor vehicle registration number KBY 187A the respondents be ordered to pay the value of the said motor vehicle in the sum of Kshs.7,335,221.55.
5. That there be an order declaring the proceedings before the Chief Magistrate's Court in Civil Miscellaneous Application No.114 of 2015 between Joseph O. Nyachoti t/a Minmax Auctioneers and E-Smart Technical College null and void.
6. That Joseph O. Nyachoti and Zablon Nyamari Mogaka the Director of the 1st defendant be ordered to show cause why they cannot be punished for abusing the court process and/or disobedience of court order dated 27th day of October 2015 and served in them or 29th day of October 2015 failure of which to the satisfaction of the court the same be punished accordingly.
7. That the costs of this application be provided for."

19. The above application is supported by the affidavit of Julius Mogaka Gekonde the plaintiff herein in which he depones that on 19th October 2015 the 2nd defendant served him with a proclamation of attachment dated 9th October 2015 and on 27th October 2015 he filed the instant suit together with the 1st application under certificate of urgency after which orders were made orders certifying the application urgent and that the respondents be served with all pleadings immediately so that the 1st application could be heard on 30th October 2015.

20. He further depones that the orders of 27th October 2015 were served upon the defendants on 29th day of October 2015 but in spite of the service and in total disregard of the case already pending before this court, the defendants quickly went to the subordinate court on the same day in **CMCC Civil Miscellaneous Application No.114 of 2015 Joseph O. Nyachoti t/a Minmax Auctioneers –vs- E-Smart Technical College** and obtained orders to levy distress and attach the plaintiff's college bus registration number KBY 187A among other goods. He thus contends that the respondents obtained the orders by misleading the lower court, by not serving the plaintiff with the application as the magistrate had ordered and by swearing a false affidavit of service.

21. The plaintiff contends that the respondents were fully aware that this court was already seized with this matter and therefore the orders obtained in the lower court were meant to defeat the High Court case. He thus terms the respondents' actions as malicious and an abuse to the due process of court. The plaintiff now fears that 2nd respondent and his agents could have tampered with the systems of the said motor vehicle registration number KBY 187A at the time of attachment on 29th day of October 2015 at 4.30pm because they drove it off violently after chasing away the

driver who had the ignition keys.

22. He further contends that the 2nd respondent intends, unless restrained by this court, to proceed and sell the said motor vehicle registration number KBY 187A pursuant of the orders of attachment obtained from the Chief Magistrate's Court and that this Court has wide and inherent powers to stop any abuse of the due process of court and to punish any person who disobeys the court orders.

23. Lastly, he avers that the said motor vehicle is new having been bought through financing by the Kenya Commercial Bank Limited in the sum of Kshs.7,068,687.55 which bank is also co-registered as the owner in the log book. He further particularized further costs that he has incurred on the motor vehicle over and above the purchase price as follows:-

i. Insurance cover - Ksh.233,084
ii. RLP - Ksh. 4,250
iii. Advance tax - Ksh. 36,720
iv. Speed Governor Purchase - Ksh. 45,000
v. Radio - Ksh. 18,000
vi. Speed Governor

Renewal certificate - Kshs. 4,000

TOTAL - Kshs.286,334/=

24. He contends that the total value of the motor vehicle attached is the sum of **Kshs.7,335,221.55** and that his institution (college) is suffering great inconvenience due to the attachment of the said motor vehicle as it cannot transport its students to and from their various destinations.

25. On 5th November a Notice of Change of Advocates was filed by the firm of M/S Oguttu Mboya & Co. Advocates to act for the respondents in place of the firm of M/S Kimanga & Co. Advocates.

26. The above 3rd application by the plaintiff was opposed by the defendants through a replying affidavit dated 6th November 2015 in which the deponent states that the plaintiff owes the 1st defendant rent arrears in the sum of **Ksh.6,801,151** and therefore the 1st defendant was justified to engage the services of the 2nd defendant to levy distress in order to recover the rents due.

27. The defendant's deponent contends after issuing the requisite notice and upon the expiry or lapse of the statutory timelines, the 2nd defendant proceeded to levy the distress by attaching motor omnibus registration number KBY 187A Isuzu on the 29th October 2015. He contends that at the time of attachment of the bus, this Honourable court had not issued any orders to stop the distress and therefore any allegation that the bus was attached in disobedience of a court order is not only misconceived, but misleading. The defendant's case is that the distress levied and more particularly the attachment of the suit omnibus was justified, lawful, valid and legitimate.

28. In addition to the above, the 1st defendant, contends that the issues pertaining to the proceedings in Kisii CMCC Misc. Application No.114 of 2015 which are alluded to by the plaintiff cannot be addressed/redressed by this Honourable Court as there was not order of this Court stopping/staying the levying of distress that was served on the defendants on 28th or 29th October 2015 or at all. He further contends that the claim for the sum of Kshs.7,355,221.55 which the plaintiff mistakenly seeks to be paid is borne out of thin air in so far as same is not part of the pleadings rendered and/or filed on behalf of the plaintiff. Consequently the purported reliefs sought at the foot of the 3rd application are untenable more so because the requisite court filing fees has not been paid for the special claim.

4th application

29. On 5th November 2015, the 1st defendants filed another Notice of Motion application under **Order 51 rule 4, 2 & 4 of the Civil Procedure Rules 2010** and **articles 47, 49 & 159 (2) (b) & (d) of the Constitution 2010** for orders that:-

1. The instant application be certified as extremely urgent and the same be heard exparte in the first instance.
2. The Honourable Court be pleased to call upon/recall the Notice of Motion application dated 2nd November 2015, which was filed under certificate of urgency and which was indeed certified urgent and same be heard and dealt with without further delay which delay may subject the 1st defendant to injustice and undue oppression.
3. The Honourable Court be pleased to discharge, vary, vacate and/or set aside the Interim Orders of injunction issued herein on the 30th October 2015 restraining the defendants from levying distress against the plaintiff/respondent with a view to recovering the outstanding rent arrears, currently standing in the sum of Kshs.6,801,151/= only together with the rents due and payable for the months of November and December 2015 respectively.
4. The Honourable Court be pleased to give further and suitable directions towards and disposal of the Notice of Motion application dated 2nd November 2015, so as to vindicate the 1st defendant's Economic and Fundamental Rights arising from ownership of the property from which the rents are due and owing.
5. Costs of this application be borne by the plaintiff.
6. Such further and/other orders be made as the court may deem fit and expedient.

30. The 4th application is supported by the affidavit of Zablon Mogambi Mogaka the 1st defendant/applicant who states that on 30th October 2015, this Court granted interim orders of injunction restraining the 1st defendant from levying distress against the plaintiff towards the recovery of the rent arrears due. The 1st defendant contends that at the time of applying for and obtaining the orders of injunction, the plaintiff misled the Court into believing that there were no rent arrears due and owing and that he had been complying with the terms of the tenancy agreement yet the plaintiff had failed to pay the quarterly rents as was agreed upon in the tenancy agreement.

31. He further contends the plaintiff has misused the orders issued on the 30th day of October 2015 to bar the 1st defendants employees from accessing and working on the stand-by generator situate in the suit premise and hence he states that the orders which were obtained by fraud, concealment of material facts and misrepresentation are now being used to cause him injustice, hardship and oppression. He thus avers that the conduct of the plaintiff is calculated to defile the sanctity of the rule of law and abuse the extent and tenure of the court orders issued in the 30th day of October 2015 hence the need for the Court to urgently intervene in the matter.

32. Lastly, he contends that there is imminent danger which needs to be abated and/or mitigated and the same can only be achieved by correcting the erroneous order which was obtained by misrepresentation of facts and that unless the instant application is heard on priority basis, the 1st defendant is bound to suffer harassment and untold injustice.

33. The plaintiff opposed the 4th application through a replying affidavit dated 13th November 2015 in which he states that the instant application by the defendants demonstrates their lack of patience and faith in the court's justice system and a misplaced notion that their rights are superior to the rights of the plaintiff who is the 1st defendant's tenant.

34. The plaintiff depones that the issues raised by the defendants in the 2nd and 4th application are issues that were already raised in the statement of grounds of opposition to the application dated 27th October 2015 (*1st application*). The plaintiff's case is that the defendants are seeking to prematurely set aside orders made on 30th October 2015 so that they can dispose of the plaintiff's bus that they had irregularly attached.

35. When this matter came up before me on 6th November 2015, it was agreed by consent that all the 4 applications be consolidated and heard at the same time. It was also agreed that all the applications be canvassed by way of written submissions to be highlighted on 20th November 2015. The defendant was also allowed to gain access to the demised premises purely for the purposes of accessing stand-by generator therein.

36. On 20th November 2015 the plaintiff's advocates herein M/S Ombachi & Co. Advocates filed a Notice of Preliminary Objection to the effect that the defendant's advocates herein M/S Oguttu Mboya & Co. Advocates ought not to act for the defendants having acted for the plaintiff in the following matters:-

1. **Kisumu Industrial Cause No.253 of 2013 Peter Morwabe & 4 others –vs- Julius Gekonde t/a E-Smart Technical College.**

2. **Kisumu Employment & Labour Relations Court No.335 of 2015 Douglas Ogiki Rogito –vs- Jilus Mogaka Gekonde – The E-Smart Technical College.**

37. When the matter came before me again on 20th November 2015, I directed that parties proceed and highlight their submissions together with the above preliminary objection raised by Mr. Ombachi.

Plaintiff's submissions

38. Mr. Ombachi counsel for the plaintiff submitted that the 1st application seeks orders of temporary injunction and outlined the principles for the grant of orders of interim injunction as spelt out in the the celebrated case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358.** The principles require the applicant to demonstrate that he has a prima facie case against the respondent with high chances of success, that the applicant will suffer irreparable loss that cannot be compensated in damages if the orders sought are not granted and when in doubt the court determines the matter on a balance of convenience. that the plaintiff is a tenant of the 1st respondent under lease dated 1st December 2012 annexed as '**JMG I'**

39. He submitted that the 1st defendant did not comply with the relevant conditions and clauses contained in the lease before advising the 2nd respondent to levy distress against the plaintiff. The plaintiff argued that the distress was levied for an amount of rent that had not been ascertained and the goods proclaimed were privileged goods in terms of **Section 16(1) (b)** and (**d)** of **Distress for Rent Act**. **Cap 293 Laws of Kenya.**

40. The plaintiff's case is that a reading of **clause 4** of the lease agreement shows that the parties did not intend that levying distress be one of the sanctions under the lease. He contended that the clause gave other remedies for default in rent other than levying of distress. On the aspect of irreparable loss, Mr. Ombachi submitted that at the plaintiff runs a college accredited by the Kenya National Examinations Council (**KNEC**) as an examination centre and November/December being an examination season the future and careers of the students would be at stake if the distress was allowed to continue as it could paralyse learning activities thereby leading to total closure of the institution. The plaintiff's counsel argued that on a balance of convenience and taking into account the fact that the plaintiff's institution serves the public at large, the plaintiff had demonstrated that he deserved the orders of interim injunction sought.

41. In response to the grounds of opposition Mr. Ombachi submitted that **Section 8 of Distress for Rent Act Cap.293** is repealed and that the 2nd and 4th applications herein, filed by the respondent, are similar both in nature in content as they both seek the setting aside of the orders made on 30th October 2015. According to the plaintiff, the 2nd and 4th application are incompetent because they seek to challenge the courts inherent jurisdiction to grant orders and further violate the core principles of natural justice on the right to be heard on the merit of the case.

42. Counsel for the plaintiff submitted that the 3rd application sought to challenge the orders that the defendant obtained before lower court contrary to the provisions of **Section 6** of the **Civil Procedure Act** that frowns upon the filing of parallel proceedings between the same parties over the same subject matter. On his allegation of illegal distress, he submitted that **Section 18** of the **Distress for Rent Act** states that a certificate must be given by the High Court or the Deputy Registrar of the High Court prior to distress being carried out.

43. On the Preliminary Objection, he submitted that the firm of Oguttu-Mboya is acting for the plaintiff in 2 matters before the Industrial Court at Kisumu being case Nos. 253 and 335 of 2015. The lease agreement that is the subject matter of this suit was also executed in the presence of and/witnessed by J.M.Oguttu advocate who is also appearing in this matter. He therefore contended that there arises a serious conflict of interest in the sense that counsel for the defendant also acts for the plaintiff in other court cases and is a potential witness in this instant case by virtue of having witness the execution of the lease agreement. According to the plaintiff, the defence counsel, had by acting in this matter, contravened the provisions of **Section 134** of the **Evidence Act** and the **Advocates Practice Rules**.

Defendant's submissions.

44. Mr. Oguttu for the defendant submitted that the Notice of Preliminary Objection dated 20th November 2015 had no pleadings or no proceeding attached to it and since the notice is not an affidavit made on oath, the objection was merely a statement made by a counsel from the bar which cannot be acted upon by the court in disqualifying an advocate from appearing in the case.

45. He further submitted that since the Preliminary Objection was founded in fact and not law, it was meant to persuade the court to exercise its discretion on whether or not to allow a counsel to participate in the proceedings. He stated that legal representation is a constitutional right of a party which under **Article 49(1)** of the Constitution, cannot be taken away on basis of mere allegation or casual statements

46. He further argued that attestation of a lease agreement is separate and distinct from the drafting a lease agreement and as such, attestation does not connote acting from the parties since it merely involves witnessing the affixation of signatures which does not amount to acting for the parties.

He further stated that the dispute before the court is not about the legality of the lease agreement as it is not disputed by the parties that the agreement exists therefore there would be no requirement for an attesting witness to be a witness in the instant case.

47. He also contended that the provisions of **Section 134** of **Evidence Act** that relate to privileged communication between advocate and client is not applicable in this case as there has been no suggestion that the plaintiff relayed any privileged information to the defence counsel that could prejudice him in this instant case.

48. In reference to the plaintiff's application dated 27th October 2015 he submitted that the plaintiff did not deny being in arrears of the agreed rent or that he was in breach of the agreed terms of the lease agreement. That the plaintiff in his own annexture to his affidavit marked '**JMG2**' acknowledges being in rent arrears of Kshs.3,586,901/=. He further contended that the rent arrears continue to accrue at the rate of Kshs.892,688/= monthly and stood Kshs.6,761,151/= as at the time of arguing the application.

49. He further contended that in distress for rent where a party is contesting the quantum of rent that party is to make tender by either depositing the amount in account on paying it but in this case, there has been no tender at all. On irreparable loss, he contended that what is before the court is a monetary claim for distress for an ascertained amount or rent. That if the present suit was to go to full hearing, the applicant could be compensated by monetary terms and further that the defendant, has not been shown to be incapable of meeting the award that could be made.

50. He further submitted that an injunction is an equitable remedy and a party coming to court for such an order must be honest, be frank and make material disclosure. In reference to this case, he submitted that the applicant, had been dishonest in stating that the notice was served in 19th October 2015 '**JMG4**'. While at the top right corner the date is 9th October 2015 and in the middle the same date at the foot left bottom corner has the signature of the plaintiff. He contended that by the plaintiff wanted to mislead the court that the requisite statutory notice had not been served.

51. He further submitted that the provisions **of Section 18 of the Distress for Rent Act** which refers to a court bailiff and court broker were terms under the repealed **Court Brokers Act** and that the relevant Act is the **Auctioneers Act** which has no requirement of a certificate. He further submitted that the term of the lease was more than 5 years and therefore the tenancy was not a controlled tenancy so as to make it necessary that leave be sought and obtained before the levying of distress.

He also submitted that levying of distress is a common law and statutory right inherent to a landlord that was not excluded from the terms of the lease agreement.

52. In reference to the 3rd application he submitted that the court did not grant any orders on 27th October 2015 stopping the levying of distress and the attachment of the suit motor vehicle. Lastly, he submitted that the claim by the plaintiff of the sum of Ksh. 7,355,221.55 being the alleged value of the said vehicle was misconceived as the said claim was not contained in the plaint and no court fees had been pain for it.

Analysis and Determination

53. Having considered all the pleadings, submissions and the authorities cited, I note that the issues that arise and that require this court's determination are as follows:

a. **Whether the Preliminary Objection raised by the Plaintiff is merited.**
b. **Whether the Plaintiff/Applicant has established a case for the grant of orders of temporary injunction pending the hearing and determination of the suit.**
c. **Whether the orders sought by the Defendants/Respondents in the 2nd and 4th applications should be granted.**
d. **Whether the Plaintiff's 3rd application should be allowed.**

Preliminary Objection

54. In the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696** Law J.A stated a preliminary objection to be thus:

> **"So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

55. Sir, Charles Newbold, President stated in the same judgment as follows:

> **"A preliminary objection is in the nature of what use to be a demurrer it raises a pure part of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

56. Counsel for the plaintiff has submitted that there is a conflict of interest if since the firm of M/S

Oguttu-Mboya & Co. Advocates acted for the plaintiff in some two matters before the Industrial Court and in the subject lease agreement which was also executed in the presence of Mr. Oguttu.

57. From my understanding of the above definition of what a Preliminary Objection is, I will agree with Mr. Oguttu's submission that the plaintiff's preliminary objection is founded on fact and not law. The fact remains that no proceeding from the 2 cases in the Industrial Court were ever presented by the plaintiff before this court apart from the Notice of the Preliminary Objection. This court still needs further evidence to establish the extent of the defendant's counsels alleged involvement in the 2 cases so as to establish whether or not the same amounts to a conflict of interest.

58. In the instant case the Preliminary Objection raised by the Applicant/Plaintiff on whether or not the firm of Oguttu Mboya Advocates should appear for the Defendants having allegedly acted for the Plaintiff in two suits before the Industrial Court and having witnessed the execution of the lease agreement the subject matter of this suit, were allegations that were made by the Plaintiff's counsel from the bar and therefore their accuracy is not verifiable.

59. Furthermore, the plaintiff has not shown in that his list of witnesses filed in court has Mr. Oguttu lined up as one of the witnesses in his case. Moreover, this court has not been told the level of involvement of Mr. Oguttu or of any partner in his firm of advocates, in the cases alleged to have been before the Industrial Court at Kisumu. It is further my finding that the mere fact that the defence counsel witnessed the agreement being signed by the parties did not automatically make the said counsel a potential witness to the case unless the legality of the contract came into question which was not the case in the instant suit.

60. I fortify my findings with the decision in **Delphis Bank Ltd –vs- Channan Singh Chatthe & 6 others CA No.Nai.136 of 2000 (UR)** in which the court, when considering a similar objection raised against Mr. Menezes Advocate for acting for one of the respondents on the ground that he had prepared the security documents the subject matter of the proceedings in the High Court, the Court of Appeal held thus:

> **"The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interest which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability, result. The authorities we allude to are king Woolen Mills Ltd & Anor =vs= M/S Kaplan & Strathon [1993] LLR 2170 (CAK), (CA 55/93) and Uhuru Highway Development Ltd & Others –vs- Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654……."**

61. In so deciding the court cited with approval English decisions in **Rukusen –vs- Ellis Munday and Clerke [1912] 1 ch 831, RF – A firm of Solicitors [1992] I A 11 E.R 353** and **Supasave Retail Ltd –vs- Coward Chance and Others [1991] 1 ALL E.R 668**. The former two cases were applied in the latter. Where sir, Nicolas **Browne – Wilkinson –V.C** summed up the general rule as follows:

> **"The English Law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rukusen –vs- Ellis Munday & Clerke [1912] 1 ch 501….the law as laid down there is that there is no absolute bar in a spoliation in a case where a partner in a firm of spoliators has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case it was also laid**

down that the court will only intervene to shop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause….(…) real prejudice to the former client unhappily, the standard to be satisfied is expressed in numerous different firms in Rukusens's Case itself – Hardy M.R laid down the rest as being that a court must be satisfied that real mischief and real prejudice will, in all human probability result if the spoliator is allowed to act….As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated….."

As is clear from those authorities each case must turn on its own facts to establish whether real mischief and real prejudice will result.

62. In the Delphis Bank case (supra) was stated;

> **"……We do not know the nature of confidential or privileged information, if any, that may have been imparted on him by either party which may be prejudicial to the other. The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties."**

63. Taking into account the decisions in the above cited authorities, my finding is that the objection raised, even if I was to accept it, will not meet the threshold set in the Mukisa Biscuits case (supra) of having the effect of disposing of the entire suit. What the defendant would do in that event, will be to appoint another firm of advocates to act for it in this case.

64. In the instant case, I am not satisfied that the plaintiff demonstrated that real mischief and prejudice will be occasioned to him if Mr. Oguttu continues to act for the defendant in this matter. In view of the above observations, the preliminary objection is hereby dismissed.

65. I will now move to the deal with the rest of the issues raised in the 4 applications.

Injunction

66. It is my opinion that the determination of the 1st application seeking orders of injunction will have the ripple effect of determining the outcome of the 3 subsequent applications in view of the fact that they all relate to the 1st application and the orders made by this court on 30th October 2015.

67. In order to determine whether the plaintiff's application for injunction is merited the court will have to consider the sequence of events that triggered the application in the first place. It is not disputed that the plaintiff was the tenant of the 1st defendant under a lease agreement that commenced on 1st December 2012. It is also on record that the plaintiff fell into rent arrears as evidence by a letter dated 1st October 2015 from the 1st defendant to the plaintiff informing him that he is in rent arrears of Kshs.6,801,151/=. The plaintiff did not deny being in default of rent and alluded to the said default at paragraph 5 of the affidavit in support of the 1st application when he stated as follows:

> **"That a dispute arose with (sic)Landlord over amount of rent due and owing from me to the landlord at the time of making pay of (sic) rent o 19th day of September 2015 in the sum of Kshs.900,000/= (Annexed and marked 'JMG3' is a copy of the said receipt of payment."**

68. I find that if indeed the applicants main quarrel with the Defendants is the issue of the amount of arrears of rent due, then nothing would have been easier than for the Plaintiff to exhibit every single payment he had made for rent as against the agreed monthly rent in order for the court to be in a more clearer picture on what he owed if any.

69. To my mind the main bone of contention by the plaintiff was not the default in rent per se but the legality of the procedure adopted by the 1st defendant towards the recovery of the rent due. In respect to the procedure the annextures filed by both the defendants and plaintiff indicate that the 1st defendant hand delivered a Demand Notice dated 1st October 2015 to the plaintiff informing him that he was in arrears of the sum of Kshs.6,801,151/= which he needed to pay within the next 7 days failure of which distress for rent would be levied against his property.

70. The plaintiff took issue with the procedure adopted by the 2nd defendant in executing the distress and stated that he was not given adequate or proper notice of the same as is required by the law. The plaintiff contends that he was only served with the proclamation notice, which is the basis of his prayer for injunction, on 19th October 2015 while the defendants contend that the plaintiff was served much earlier on 9th October 2015.

71. **Section 4(1)** of the **Distress for Rent Act Cap.293** Laws of Kenya provides as follows:-

> ***"Where any goods or chattels are distrained for rent resolved and due upon a grant, demise, lease or contract, and the tenant or owner of the goods or chattels so distrained does not, within fourteen days after distress has been made and notices thereof (stating the cause of the making of the distress) left on the premises charged with the rent distrained for, pay the rent together with the costs of the distress or replevy them, with sufficient security to be given to the licensed auctioneer according to the law the person distraining may lawfully sell on the premises or remove and sell the goods and chattels so distrained for the best price which can be obtained for them, towards satisfaction of the rent for which they are distrained, and of the charges of the distress, removal and sale, handing over the surplus (if any) to the owner."***

72. It is noteworthy that as at the time the plaintiff filed the 1st application on 27th October 2015, the 2nd defendant had not collected the proclaimed goods and so therefore I find that the issue of inadequate notice does not arise. As I have already stated in this judgment the Plaintiff does not deny that he is in arrears of rent. All the Plaintiff seems to be doing is blame the 1st Defendant for failing to render an account of the amount due or in arrears.

73. The 1st Defendant, on the other hand, has in his replying affidavit and defence filed in court stated that the rent arrears due as at October 2015 was Kshs.6,801,151/=. This claim by the 1st Defendant has not been denied by the Plaintiff.

The question which now arises is whether the Plaintiff can obtain orders of injunction to restrain the 1st Defendant from exercising his rights, as a landlord, to levy distress for the rent arrears due. The answer to the above question is to the negative. The tenancy agreement between the Plaintiff and the Defendant was not a controlled tenancy since it was stated to run for a period of over 5 years.

74. I find that once the Plaintiff has acknowledged that he is indeed in arrears of rent, it means that he is in breach of the most critical term of their tenancy agreement and being a defaulting party, he cannot be seen to approach the court for an order of injunction which is an equitable relief/remedy only available to parties who come to court with clean hands.

75. I am not convinced that the Applicant/Plaintiff has established that he has a prima facie case against the Defendants with high chances of success due to his default of rent. The principles for the grant of orders of interim injunction were well stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358**.

76. In **Felix Construction Solutions Ltd –vs- Vernadel Court Limited [2012] eKLR** it was stated:-

> **"However, though in an interlocutory application the court is not required to make**

any conclusive or definitive findings of fact or law, in the basis of contradictory affidavit evidence on disputed propositions of law, it is properly entitled to express a prima facie view of the matter and to consider what else the deponent to the supporting affidavit has stated on oath is not true. A prima facie case, it has been held, is a case in which in the material presented t the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. See Miao Ltd & 2 others [2003] KLR 125."

77. In exercising its discretion under the **Civil Procedure Act**, or in determining whether or not to grant the injunction sought the court is determined to consider what has become known as the principle of proportionality under the overriding objective which objective the court is enjoined to give effect to in the exercise of its powers under the Act or the interpretation of any of its provisions.

78. In **Suleiman –vs- Amboseli Resort Limited [2004] 2 KLR 589** Ojwang A J, (*as he was then*) expressed himself as follows:-

"It is the business of the court, so far as possible, to ensure that any transitional motions before the court do not render nugatory that ultimate end of justice……the argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement as it expounds, to cover new situations not exactly, foreseen before, traditionally on the basis of the well accepted principles the court has had to consider the following questions before granting injunctive relief. (i) is there a prima facie case, with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests it is worth adopting a further albeit and move intrinsic test which is now in the nature of general principle the court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice. Although, the court is unable at this state to say that the applicant has a prima facie case with a probability of success, the court is quite convinced that it will cause the applicant irreparable harm if this prayers for injunctive relief are not granted and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent there would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant."

79. The applicant's case would have been different if his claim was that the distress for rent was happening in the face of his not being in any default. The Plaintiff had alleged that his institution being a learning institution and an examination centre for that matter, learning activities and examinations would be gravely affected if the distress for rent was to continue unabated. This court is not able to tell if the examination season is still on or not. To my mind the students who learn in the plaintiff's institution and who are not parties to this suit, would suffer irreparably if their learning and examinations were paralyzed by the distress for rent. The 1st defendant, on his part also stands to suffer huge financial losses in terms of unpaid rent should he be restrained from exercising his statutory rights as a landlord to levy distress for unpaid rent.

80. It is in view of the above findings that this court aligns itself with the observations of Ojwang J. (*as he then was*) that ***"although, the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted and in these circumstances,".***

81. Having regard to the above authority, the circumstances of this case and in the interest of justice for the protagonists in this matter and the students at the plaintiff's college, the order that

commends itself to me is to partly allow the prayer for an interim injunction which shall be in place for 15 (fifteen) days only during which period the plaintiff shall clear all the rents due and owing to the defendant failure of which the interim orders will automatically lapse and/or stand vacated, and the 1st defendant shall be at liberty to issue a fresh proclamation notice to the plaintiff for purposes of distress.

2nd and 4th Applications:

82. Having dealt with the 1st application, it automatically follows that the defendants' 2nd and 4th applications are resolved/settled as they basically sought the setting aside, stay or variation of the orders made on 30th October 2015. The 2nd and 4th applications were to my mind, prematurely filed by the Defendants as their contents therefore ought to have formed the basis or part of the Defendant's response to the 1st application.

83. There was really no reason to seek a setting aside or variation of orders issued on an Interim basis pending the interpartes hearing of the application. The 2nd and 4th applications are therefore stand struck out with no orders as to costs.

3rd Application

84. In respect to the 3rd application filed by the plaintiff seeking the unconditional release of motor vehicle registration number KBY 187A that was attached by the Defendants on 29th October 2015, I note that the said attachment was done one day after the Defendants were served with the 1st application that was slated for inter partes hearing the following day on 30th October 2015.

I agree with the Plaintiff's contention that the said attachment, done under the guise of levying distress for rent, was conducted in bad faith and was intended to pre-empt the outcome of this case, to steal the match from the plaintiff and circumvent the due process of this court. Even though the interim orders of injunction had by then not been granted, the Defendants were upon been served with the court documents, expected to be patient and exhibit respect to the law and the already initiated court process by holding their horses on any intended adverse action, pending the outcome of the court case.

85. **Section 6** of the **Civil Procedure Act** states as follows:

> ***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

86. The defendants do not deny that they were duly served with the initial pleadings and order of this court directing that the 1st application be heard on 30th October 2015. Instead of waiting for the hearing of the 1st application, the Defendants mischievously and in outright disregard to the rule of res subjudice stated in **Section 6** of the **Civil Procedure Act**, rushed to jump the gun by filing a miscellaneous application and obtaining quick orders from the lower court in a move clearly calculated to defeat the case pending before this court and steal the match from the plaintiff. I note that it would not have costed the Defendants anything to await the due process of the law to run its course. This conduct by the Defendants does not augur well for the proper and fair administration of justice and it is for this reason that I allow part of prayer 3 only of the application dated 4th November 2015.The costs of the 3rd application shall abide the outcome of the main suit.

87. In the end therefore I make final orders in this matter as follows:

a. **The prayer for interim orders of injunction in the 1st application is hereby allowed BUT the same shall be in force for 15 days only to allow the plaintiff settle all the rents due and owing to the defendant failure of which the said interim orders shall automatically lapse and/or stand vacated and the 1st defendant shall be at liberty to issue a fresh proclamation notice for purposes of levying distress for the rent arrears due.**
b. **The plaintiff's motor vehicle registration number KBY 187A Isuzu Bus shall be released forthwith and unconditionally to the plaintiff by the defendants.**
c. **The proceedings before the Kisii Chief Magistrates Court in Civil Misc. Application No. 14 of 2015 between the plaintiff and the 2nd defendant are hereby stayed for 15 days in line with order no. 1 herein above.**
d. **Any claim that the plaintiff may have in respect to the alleged damage to the Motor Vehicle may be canvassed in the main suit.**
e. **The costs of the applications shall abide the outcome of the main suit.**

Dated, signed and delivered in open court this 7th day of March, 2016

HON. W. OKWANY

JUDGE

In the presence of:

M/S Gekonde for the Plaintiff

M/S Oguttu for the Respondents

Omwoyo court clerk